

No. 93-1251

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1994

DONNA E. SHALALA, SECRETARY OF  
HEALTH AND HUMAN SERVICES,

*Petitioner,*

v.

GUERNSEY MEMORIAL HOSPITAL,

*Respondent.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Sixth Circuit

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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## SUPPLEMENTAL BRIEF

Respondent hereby submits this Supplemental Brief, pursuant to Rule 25.5 of the Rules of the Supreme Court of the United States, to distinguish certain aspects of this Court's recent decision in *Thomas Jefferson University v. Shalala*, 1994 WL 276674, 62 U.S.L.W. 4601, 511 U.S. \_\_\_, 114 S.Ct. \_\_\_, 128 L.Ed.2d \_\_\_ (June 24, 1994), from the case currently pending before the Court.

The issue before this Court in *Thomas Jefferson University*, was the proper interpretation to be given to Medicare regulation 42 C.F.R. § 413.85(c). This regulation specifically dealt with the reimbursement of graduate medical education ("GME") costs. The Court was not asked to give force and effect to a provision of the Secretary's Provider Reimbursement Manual ("PRM") which conflicted with a regulation. In reaching its decision, the Court held that the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, required that deference be given to an agency's interpretation of its own regulation and that such deference was even more warranted in light of the fact that the Medicare program was "a complex and highly technical regulatory program" involving the "identification and classification of relevant criteria." *Id.* at 5. This Court also recognized, however, that an agency interpretation is entitled to considerably less deference when the Court is presented with persuasive evidence that the Secretary has acted in an inconsistent manner. *Id.* at 6.

Applying this standard, the Court held that the Secretary's construction of 42 C.F.R. § 413.85(c) was "faithful to the regulation's plain language." *Id.* at 7. The result of

the Court's decision was to create a factual question which must be resolved on a case by case basis as to how certain costs have been reported in the past by providers with GME programs.

As contrasted with the issue before the Court in *Thomas Jefferson University*, the present case does not involve the Secretary's interpretation of a regulation which specifically defines the reimbursement effect of a particular type of cost. In fact, it is the Respondent's position that there is no regulation which specifically deals with the issue of how to treat advance refunding losses other than general regulations requiring application of generally accepted accounting principles ("GAAP"). Rather, this Court is being asked to determine the propriety of the Secretary implementing section 233 of the PRM - a "rule" which has not been subjected to the APA's rulemaking process and which stands in direct conflict with the Secretary's own regulations (42 C.F.R. §§ 413.20, 413.24, and 413.5).

In addition, and as has been set forth in Respondent's Brief, as well as in the amici briefs supportive of Respondent's position, persuasive evidence exists that the Secretary has acted in an inconsistent manner in the application of GAAP to cases involving Medicare reimbursement. A decision by this Court striking down section 233 of the PRM will affirm the plain language of the relevant Medicare regulations.

As such, factors which the Court found persuasive in deferring to the Secretary in *Thomas Jefferson University* are completely lacking in the present case. For the above reasons and those already set forth in Respondent's Brief,

Respondent respectfully requests that the decision of the United States Court of Appeals for the Sixth Circuit be affirmed.

Respectfully submitted,

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